76-4941

IN THE

Supreme Court of the United States

October Term, 1976.

No.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCALS 542, 542-A, 542-B,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

INDEX (Continued).

TABLE OF CITATIONS.

TABLE OF CITATIONS (Continued).

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, International Union of Operating Engineers, Locals 542, 542-A, 542-B, respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit, entered herein on April 19, 1976.

OPINIONS BELOW.

The Decision of the Administrative Law Judge, printed as Appendix B, *infra,* is reported at 216 NLRB No. 67. The Decision and Order of the National Labor Relations Board, printed as Appendix C, *infra,* is reported at 216 NLRB No. 67. The Dissenting Opinion of Acting Chairman Fanning, printed as Appendix D, *infra,* is reported at 216 NLRB No. 67. The Opinion of the United States Court of Appeals for the Third Circuit, printed as Appendix E, *infra,* is reported at 532 F. 2d 902 (1976). The Dissenting Opinion of Circuit Judge Adams printed as Appendix F, *infra,* is reported at 532 F. 2d 902, 908 (1976). The Judgment of the United States Court of Appeals for the Third Circuit, printed as Appendix G, *infra,* is not reported.

JURISDICTION.

The Judgment of the United States Court of Appeals for the Third Circuit was entered on April 19, 1976 (Appendix G). Petition for Rehearing was denied on May 10, 1976. On July 30, 1976, Mr. Justice William J. Brennan, Jr., entered an order extending time for filing a petition for writ of certiorari herein, to and including October 7, 1976. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Where two construction companies are commonly owned, operated, managed and controlled in every respect, perform the same work, and "compete" for the same business, have common officers, offices and equipment, is this not a single employer, and where one "company" seeks contract with the petitioner union and the other hires solely through other sources (another union), causing loss of work opportunities to petitioner union's people, may not the latter union refuse to make a contract with such "union" company unless the dual enterprise deals wholly with petitioner union, and is not the union free of violation of Section 8(b)(3)?

a. Did not the Board majority commit substantial error in concluding that the union illegally refused to bargain in violation of Section 8(b)(3) where the Board did not make a finding that there were, in fact, separate employers and not a single employer?

2. Under such circumstances, can there be "secondary boycott" coercion in violation of Section 8(b)(4)(ii)(A) for refusing to refer employees unless the employer is shown to be dependent upon the union's referral of employees?

a. Did not the Board majority err in concluding that a secondary boycott existed without formal finding that the employer was an independent enterprise, and not a mere segment of the dual company which does *not* rely on the union for all of its employees?

3. Where the respondent union specifically asserts that it has no interest in the company's employees or in negotiating a contract with the company, and counsel states same in open court, can the union be forced to bargain with said company?

(a) In such case, where allegedly improper "hot cargo" clause would not be sought in any event, having been discarded by the union in its past several contracts, is not the case moot, or at least no longer viable, making enforcement of the Board's order vain and unnecessary?

4. May the Labor Board order a union to refer workmen to an employer in absence of a collective bargaining agreement?

STATUTES INVOLVED.

The statutory provisions involved are National Labor Relations Act, Sections 502, 7, 8(b)(3), 8(b)(4)(ii)(A), 8(d) and 8(e), 29 U. S. C. A. 143, 157, 158(b)(3), 158 (b)(4)(ii)(A), 158(d) and 158(e).

STATEMENT OF THE CASE.

The complaint alleges violations of Sections 8(b)(3) and 8(b)(4)(ii)(A) of the National Labor Relations Act. It states that the union demanded that York County Bridge, Inc. ("employer") enter into a collective bargaining agreement which includes the following langauge:

> "Section 11—Non-Union Equipment:
>
> "(a) No operator shall be required to operate equipment belonging to a contractor or supplier with whom this Local Union is not in signed relations, provided, Union equipment is available in the locality. No party to this agreement shall rent or supply equipment unmanned to anyone doing construction work covered by this agreement who is not in signed relations with this Union.
>
> "(b) No employee represented by this Union on construction work shall be required to operate equipment of or for any Employer who has any interest in a firm or company doing construction work within the jurisdiction of this Union and which is not in signed relations with this Union."

The complaint further alleges that, in furtherance of the previously alleged demand, respondent has "threatened to refuse to furnish workers to York."

Although the employer complains that the union demanded that it sign the standard union contract, the evidence from *both* sides agrees that *York actively pursued* the union, beseeching that it be permitted to sign the "standard" contract (NT 62, 86, 122, 142, 172-73). The union did not want to have a contract with York because of its unity with Wagman Co., a commonly owned, operated and controlled company, which had no contract with

this union, and bid on, and did exactly the same kind of work as York.[1] Petitioner is an AFL-CIO union; Wagman hires solely through District 50 unaffiliated.

The union could not permit itself to be caught between the two faces of this single enterprise, which bids on jobs and, then, decides whether to do it AFL-CIO or not (NT 165-66). Only if York-Wagman decided to do the job with AFL-CIO people would petitioner union be given employment. The work opportunities of the union's people were always in jeopardy (NT 171). The union's position and fears were clear in the record: it wanted to preserve its people's work (NT 164), and would not be victimized by York-Wagman working "both sides of the fence", employing Local 542 people only when absolutely necessary, and then dropping them (NT 164). The employer would have a grasp on the union, but the union had no *quid pro quo*—for York-Wagman did not rely on the union—it had access to the non-Local 542 operators who worked through the Wagman aspect of the enterprise (NT 165-66, 167-68).

Therefore, the union said it would enter into the contract, as York was insisting, if York would "bring all their operations under the agreement within a certain length of time" (NT 86); that "if York had a different proposal, [we] would be willing to listen" (NT 87, 105-06, 108, 171-72, 173). Otherwise, it wanted to have nothing to do with York! The union even offered to specially change its

1. York County Bridge, Inc. and Wagman & Wagman, Inc. are both in the construction business. Wagman wholly owns York; their officers are the same; they share the same office and office employees; equipment is used interchangeably; they use common professional employees; *all* major (including labor relations) decisions for both are made by the same individuals (NT 88, 100, 102, 113-14, 116, 118). The work of both companies is admittedly the same (NT 116, 121). Thus, the Administrative Law Judge said that York and Wagman are two parts "of a dual company" and "essentially one enterprise" (Ruling on Motions, 8/7/73, pp. 5, 6).

"standard" labor contract (including Section 11, of which the NLRB was complaining), if something could be worked out "to cover the dual company situation" (NT 173, 179-80, 183; Exh. R-2, R-3). But, York refused to do *anything* (NT 87, 173) so that situation remained intolerable.

To force the union to enter into a contract, or, at least, to refer its people without a contract, whenever the employer deems it advantageous, the employer brought these charges.

The Administrative Law Judge concluded that the union did *not* engage in any unfair labor practice and recommended dismissal of the complaint (Appendix B, *infra*). The NLRB panel split, 2-to-1, in reversing the Law Judge (Appendix C, *infra*). Acting Chairman Fanning, dissenting, would dismiss the complaint (Appendix D, *infra*). The Court of Appeals for the Third Circuit, in a 2-1 decision, enforced the Board's order (Appendix E, *infra*). Circuit Judge Adams dissented, and would refuse enforcement (Appendix F, *infra*).

REASONS FOR GRANTING THE WRIT.

I. There Is No Refusal to Bargain Collectively With an Employer, in Violation of Section 8(b)(3), Where the Employer Does Not Bargain Fully With the Union. Where the Union Urges That the Complainant Company Is, in Fact, One Face of a Single Employer, Involving Another Company Which Will Not Bargain With the Union, the Board Must Make a Formal Finding as to Whether the Complainant Is Independent, or Both Companies Are, in Fact, a Single Employer; If the Latter, a Violation Cannot Exist. The Board's Failure to Make This Finding Conflicts With Its Duty as Expressed in *South Prairie Constr. Co. v. Local 627, Operating Engineers*, — U. S. — , and *Radio and TV Broadcast Technicians, Local 1264 v. Broadcast Service of Mobile*, 380 U. S. 255.

The majority of the panel below states that the union, by its "coercion", is trying to enlarge its bargaining unit, by going through York to replace the union representing Wagman employees. This *cannot* be the case, because there is but *one* employer, by whatever names called. See *Radio & TV Local 1624 v. Broadcast Service of Mobile*, 380 U. S. 255, 13 L. Ed. 2d 789 (1965). The majority discounts this fact by stating that "the Board did not find that York and Wagman constituted a single employer. . . ." But, as Judge Adams emphasized in his dissent, the Board made *no finding at all* as to whether they were a single employer *or* separate employers; and in absence of this finding the conclusion reached by the majority cannot stand. Fundamental to any finding or conclusion on the unfair practice charges in this case is the answer to that question (532 F. 2d at 908-09, 910).

In *South Prairie Constr. Co. v. Local 627, Operating Engineers*, — U. S. —, 48 L. Ed. 2d 382 (1976), this Court confirmed its statement in *Radio & TV Local 1624 v. Broadcast Service of Mobile, supra*, that (U. S. at —, L. Ed. at 385):

> "'. . . in determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise, NLRB Twenty-first Ann Rep 14-15 (1956). The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership. . . .'"

This Court also affirmed the reasoning of the District of Columbia Court of Appeals[2] that "in determining *the relevant employer*", the Board must initially decide existing issues of unity or separateness of the employer or employers who may be involved; that the "presence of a very substantial qualitative degree of centralized control of labor relations" and of "interrelation of operations and common management", are not found "in the arm's length relationship existing among unintegrated companies." U. S. at —, L. Ed. at 385. Clearly, the evidence in the instant case falls compellingly into this pattern; and the Board should have found that York/Wagman is a single employer. However, the Board did not so find. Despite the urgent presence of this issue, and the fact that the Administrative Law Judge found that they were a single employer, *the Board made no actual determination at all*

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2. *Local 627, International Union of Operating Engineers v. NLRB*, 518 F. 2d 1040, 1046, 1047 (D. C. Cir. 1975). There, under less demanding facts, the Court held that two companies were, in fact, a "single employer."

on this essential "threshold 'employer' issue."[3] It found neither one employer nor two employers. Had the Board proceeded to an ultimate finding on this basic issue, it would have been brought back from its tangential conclusion, as mandated by this Court.

As Judge Adams emphasized, if York and Wagman are really one employer, then the alleged "expansion of the bargaining unit to include Wagman employees could well be a matter concerning the 'terms and conditions of employment'" and would be a mandatory subject of bargaining, and the union's alleged demand would *not* be a violation of Section 8(b)(3) of the Act. Thus, the outcome of the charge depends upon a determination as to the York/Wagman relationship, in absence of which determination there can be no conclusion of violation (532 F. 2d at 910).

II. Secondary Activity Cannot Exist Under Section 8(b)(4)(ii)(A) Without Restraint or Coercion. There Can Be No Restraint or Coercion Because of Refusal to Refer Employees Where the Employer Is Not Shown to Be Dependent on the Union for Workers. In Absence of a Specific Finding That York Is an Independent Enterprise, and Not One Part of a "Double-Breasted" Entity Which Also Has Other Sources of Employees, Such Coercion Cannot Be Concluded.

The same requirement of a specific finding as to the relationship between York and Wagman exists as basis for the conclusion that a Section 8(b)(4)(ii)(A) violation existed. The element of restraint or coercion is essential to such violation, and it cannot otherwise be established.

3. See *South Prairie Construction Co.*, U. S. at —, L. Ed. at 386.

Even if the agreement *did* have an improper "hot cargo" clause, in violation of Section 8(e) of the Act, there would be no violation of Section 8(b)(4) unless there was threat or coercion to compel York to enter into it. *NLRB v. Denver Bldg. & Constr. Trades Council, et al.*, 341 U. S. 675, 687-89, 95 L. Ed. 1284 (1951); *Seafarers Int'l Union v. NLRB*, 265 F. 2d 585, 590 (D. C. Cir. 1959).[4]

Whether or not there was such threat or coercion depends upon a finding which is absent from the record. In his dissent, Judge Adams points out that the union's refusal to furnish York with employees is "restraint or coercion" *only* "if [York] is dependent upon the union's referral of employees", citing *Local 5, Plumbers & Pipefitters v. NLRB*, 321 F. 2d 366 (D. C. Cir. 1963) (532 F. 2d at 910). He continues:

> ". . . But whether York was dependent upon Local 542 members turns on whether York is an independent enterprise, unable to bid successfully in its geographical area of operation without a contract with the Local, or is merely a segment of the unitary York-Wagman entity, relying on the Local *for only part* of its operation. A finding by the Board on the single/dual employer question would thus appear to be a prerequisite to a ruling on whether Local 542 violated the terms of section 8(b)(4)(ii)(A) of the Act, just as it is critical to the 8(b)(3) charges." (532 F. 2d at 910). (Emphasis supplied.)[5]

4. The Administrative Law Judge found that no such threat or coercion existed (A18).

5. Here, such dependency does *not* exist. As the Administrative Law Judge found, both companies are actually a "single employer". This enterprise, York-Wagman, has equipment operators in its *non*-Local 542 pool. If this union could rely on such genuine dependency of the employer, it would not so fend off York's pursuit

The Board majority has thus made conclusions of law, without the essential factual determination. Such a decision cannot stand.

Judge Adams' dissenting analysis of the Board majority decision best demonstrates its incongruity of logic and of legal concept. He notes the union's contention that the separation of a single employer into two parts is pure subterfuge, and that if the union is correct, then it would bargain with "the unitary York-Wagman company". But, if the employer is correct, and York and Wagman are independent of each other, then the union, if it is "pressuring" anyone, is coercing York in an effort to affect Wagman, a "secondary" activity (532 F. 2d at 908). Judge Adams continues (F. 2d at 908-09):

> "Resting its decision on a narrow ground, the Board did not make a specific finding with regard to the identity of the employer. Over the dissenting voice of Acting Chairman Fanning, it held that the Local's demands transgressed the dictates of section 8(b) of the Act. The Board could reach that result only by concluding that resolution of the single/dual employer issue is not essential to a determination of the unfair labor practice charges. By enforcing the Board's order, the majority of the Court necessarily agrees with that stance.
>
> "My reading of the law is different, however. In my opinion, a ruling on the unfair labor practice charges cannot properly be made, in the circumstances

5. (Cont'd.)

for a contract. This is the very heart of this case. In *Local No. 5, supra*, at pages 370-71, Judge Bastian recognized the practical meaning of "dependent union." There, the employer under contract with respondent union had no other ties or sources of workmen, except that union. Here, the employer has both fields in which to graze.

> of this case, without a prior finding on the single/dual employer question. Enforcement of the Board's order would thus appear inappropriate."

The Board's decision punished the union for its exhaustive effort to preserve its people's work at the job-site, the union's statutory duty as expressed by this Court in *National Woodwork Mfrs. Assn. v. NLRB*, 386 U. S. 612, 18 L. Ed. 2d 357 (1967),[6] This is clearly an improper deprivation. But, even if it is the Board's desire to sublimate this statutory right and duty, it surely may not legally do so without making *the essential threshold findings of fact.*

III. A Union May Not Be Forced to Bargain or Contract With an Employer in Whose Employees It Has No Interest. The Board's Order Conflicts With the Policy Expressed By This Court in *H. K. Porter Co. v. NLRB*, 397 U. S. 99, and the Specific Implementation of Such Policy By the Fifth Circuit in *Corrugated Asbestos Contractors, Inc. v. NLRB*, 458 F. 2d 683.

In *H. K. Porter Co. v. NLRB*, 397 U. S. 99, 25 L. Ed. 2d 146 (1970), this Court confirmed "that the National Labor Relations Act is grounded on the principle of freedom of contract". Thus, in *Corrugated Asbestos Contractors, Inc. v. NLRB*, 458 F. 2d 683, 687 (5th Cir. 1972), after a work assignment dispute was lost by the union, it thereafter refused to bargain for a new contract, upon expiration of the old one, its agent stating that it had no further interest in representing the company's employees (685-86). The court dismissed a section 8(b)(3) complaint, citing testimony by the union's agent which reflects

6. The Administrative Law Judge also specifically found that the union's purpose was to preserve and protect its work (A18).

the position and intent expressed by the union in the instant case. The court noted that the union "did not want to become continuously embroiled in the type of . . . disputes that exist here, disputes that they felt were certain to continue." Respondent "simply . . . wanted out." The court's discussion is further most significant (687):

> ". . . There is nothing to establish bad faith in the union's desire to avoid further 10(k) disputes with the company. We cannot force a union to continue, against its wishes, a relationship that is in its very nature predicated upon voluntariness and consent. *See* H. K. Porter Co. v. N. L. R. B., 1970, 397 U. S. 99, 102, 109, 90 S. Ct. 821, 25 L. Ed. 2d 146."

The majority of the panel below states that since the union "has never issued any formal and unequivocal disclaimer of a desire to represent York employees" (532 F. 2d at 907), the union may then be forced to bargain with the employer. It is clear from the record that the union stated many times that it does not desire to represent employees of a "double-breasted" or dual company, such as York/Wagman, because such a company is in a straddling position, to take destructive advantage of the union whenever it sees fit; and the latter did not choose to subject itself to such a situation.[7]

The position taken by the Board and the Court below conflicts with the Federal policy stated by this Court in *H. K. Porter*. Further, it is the opposite of that expressed by the Fifth Circuit in *Corrugated Asbestos*. Thus, review by this Court is necessary to settle the difference of opinion as to the nature of "the premise of freedom of contract" expressed in *H. K. Porter*.

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7. In his dissent, Judge Adams points out that such disclaimer was stated even in open court (532 F. 2d at 911).

IV. The Matter Is Moot; or, at Least No Longer Viable.

The contract language deemed illegal by complainant has not been used in petitioner union's labor agreements since the contract at issue expired, in 1973. It is true that an order lawful when made retains its viability despite changing circumstances. However, here, the union offered to actually renegotiate the specific provisions *before* the trial in this case, and long before the decisions of the Administrative Law Judge or the Board.[8] The Court majority below states that the "possibilities of repetition of the offending conduct . . . is a relevant consideration." (532 F. 2d at 905). The fact is, however, that for three ensuing contracts, the language deemed offensive has not been used, and *no one has even urged* that the language which has since regularly been used is, in the least, violative of the law.[9] Thus, the matter is moot and should be dismissed. *McLeod v. Genl. Electric Co.*, 385 U. S. 533, 17 L. Ed. 2d 588 (1967); *U. S. v. W. T. Grant Co.*, 345 U. S. 629, 632, 97 L. Ed. 1303, 1309 (1953).

In his dissent, Judge Adams states that a remand is necessary to decide the merits of this case, but continues that while a remand may be proper, it is unnecessary, since "the case no longer represents a viable dispute . . ." (532 F. 2d at 910-11). He points out that the union, even up to the time of argument of this case, "no longer has an interest in negotiating a collective bargaining contract with York, and that a hot cargo clause will not be sought in any event." This posture, Judge Adams states, substantially reduces the statutory interest of the Board in pursuing the case (532 F. 2d at 911). This is, indeed, the essence of the doctrine of mootness even though, as the majority holds, "the case is not, as a technical matter, moot."

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8. NT 179-80, 181-82, 183.

9. Hrg., 6/4/73, NT 24.

As Judge Adams urges, the exercise of the Court's equitable power will *not* further the objectives of the National Labor Relations Act; and it "would be most fitting to close the case here." (532 F. 2d at 911). In view of the fact that the faulted language is no longer being used, and has not been used for several ensuing contract terms, the "possibility of repetition of the offending conduct" is, indeed, non-existent, and renders the matter moot.

V. The Order of the Labor Board Improperly Forces the Union to Refer Workmen to the Employer Despite the Absence of a Collective Bargaining Agreement. This Violates Sections 7, 8(d) and 502 of the National Labor Relations Act; and Conflicts With the "Voluntariness and Consent" Mandated by This Court in *H. K. Porter Co. v. NLRB*, 397 U. S. 99.

The Board's order places the union in an untenable situation. It orders that the union cease and desist from:

> (a) Insisting that York make an agreement which is prohibited by Section 8(e) of the Act, or which covers a unit represented by another union, as a condition to executing a labor contract with York, *or* as a condition to furnishing employees to York;
>
> (b) Refusing to refer workmen to York, in order to force York to make an agreement which violates Section 8(e).

Aside from the deficiencies in this record which are essential to support such an order, it is obvious that this union would be forced to supply workmen to York in complete absence of a collective bargaining agreement (and despite the fact that the union disclaims interest in representing employees of that company). Any refusal by the union to refer people, even in complete absence of any labor contract, would automatically be a violation of the order. In effect, the union would be forced to give York all of the fruits of a collective bargaining contract without such a contract, and in complete absence of any bargaining obligation.

This is clearly in violation of Section 502 of the National Labor Relations Act, Act of June 23, 1947, c. 120, Title V, § 502, 29 U. S. C. A. 143, which provides, *inter alia*, that

> "Nothing in this chapter shall be construed to require an individual to render labor or service without his consent . . .; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. . . ."

Section 101 [10] of the Act, 29 U. S. C. A. 157, provides that

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Thus, the Congress has consistently seen fit to condition the giving of labor upon the consent of the individual worker and, when he organizes with others, upon the consent, by contract, of the labor organization. In *H. K.*

10. Section 7 of the former Wagner Act of July 5, 1935, c. 372, 29 U. S. C. A. 157.

Porter Co. v. NLRB, 397 U. S. 99, 107, 25 L. Ed. 2d 146, 152 (1970), this Court said that the Act "is grounded on the premise of freedom of contract"; that the statutory definition of the duty to bargain collectively in Section 8(d) of the Act "does *not* compel either party to agree to a proposal or require the making of a concession." (U. S. at 106-07, L. Ed. at 152-53). This Court stated:

> ". . . It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." (U. S. at 107, L. Ed. at 153).

Despite this specific limitation on its powers, the Board seeks to force on this union the effective obligation of a contract without the formal existence of one. It compels the union to give, without contract, the fruits of a relationship which, by law, *must* be based upon "voluntariness and consent." The fact that the union may not be forced into actually signing a contract means nothing where it is nevertheless forced to *act* as if such contract exists. This Court should review this matter and reverse such order.

CONCLUSION.

The single/dual employer issue is "a newly evolving area of labor law," as stated by Judge Adams in his dissent.[11] The Board and the panel majority below have made a broad decision upon this issue with no specific finding in the record to support it. The uncontroverted facts would, indeed, require the opposite conclusion, as determined by the Administrative Law Judge and Acting Chairman Fanning. This is further aggravated by an order which would force the union to give the employer the fruits of a non-existent contract.

It is respectfully submitted that the judgment below enforcing such order should be reviewed and reversed, and enforcement be denied.

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11. 532 F. 2d at 911.

APPENDIX A.

National Labor Relations Act (29 USCA)

• • •

§ 143. Saving provisions

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

June 23, 1947, c. 120, Title V, § 502, 61 Stat. 162.

• • •

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

• • •

§ 158. Unfair labor practices

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . .

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other persons" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140, as amended.

APPENDIX B.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Case 4-CB-1900

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCALS 542, 542-A, 542-B

and

YORK COUNTY BRIDGE, INC.

Case 4-CC-653

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCALS 542, 542-A, 542-B

and

YORK COUNTY BRIDGE, INC.

Case 4-CB-1901

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCALS 542, 542-A, 542-B

and

CONTRACTORS ASSOCIATION OF
EASTERN PENNSYLVANIA

Jeffrey C. Falkin, Esq., and *Robert D. Kaplan, Esq.*, Phila., Pa., for the General Counsel.

Earle K. Shawe, Esq., Norman R. Buchsbaum, Esq., and *Shawe & Rosenthal*, Baltimore, Md., for York County Bridge, Inc.

Martin J. Vigderman, Esq., and *Freedman, Borowsky and Lorry*, Phila., Pa. (*Abraham E. Freedman*, with them on the brief), for the Respondents.

Decision.

Statement of the Case

Alvin Lieberman, Administrative Law Judge: The trial in this proceeding was held before me in Philadelphia, Pennsylvania, on May 22 and 23, 1972, upon the General Counsel's complaint [1] and respondent's answer. The issues litigated were whether respondents violated Section 8(b)(3) and 8(b)(4)(ii)(A) of the National Labor Relations Act, as amended (Act), by striking members of employer associations, including Contractors Association of Eastern Pennsylvania (CAEP), for which Operating Engineers Employers of Eastern Pennsylvania and Delaware (Engineers Employers) was the bargaining agent and by threatening to refuse to furnish employees to York County Bridge, Inc., (York) in order to force Engineers

1. The complaint was issued pursuant to charges filed on November 1, 1971, by York County Bridge, Inc., (4-CB-1900 and 4-CC-653) and Contractors Association of Eastern Pennsylvania (4-CB-1901). As will be set forth below, the charges filed by both charging parties were privately settled during the trial. However, the settlement entered into by respondents and York County Bridge, Inc., was, in effect, set aside.

Employers and York to enter into an agreement prohibited by Section 8(e).[2]

Upon the entire record, upon my observation of the witnesses and their demeanor while testifying, and having taken into account the arguments made and the briefs submitted,[3] I make the following:

Findings of Fact.

I. *Jurisdiction.*

York, a Pennsylvania corporation whose principal office is located at York, Pennsylvania, is engaged in pile driving and in the construction of bridges and dams. York annually purchases goods and services from suppliers located outside the Commonwealth of Pennsylvania valued at more than $50,000. Accordingly, I find that York is a construction industry employer within the meaning of Section 8(e) of the Act and is engaged in commerce within the meaning of Section 2(6) and 8(b)(4). I conclude, therefore, that the assertion of jurisdiction over this Matter by the National Labor Relations Board (Board) is warranted.

2. In pertinent part the provisions of the Act mentioned in the text are as follows:

Sec 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees . . .

(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:

(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e)

* * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . .

3. Although all the arguments of the parties and the authorities cited by them, whether appearing in their briefs or made orally at the trial, may not be discussed in this Decision, each has been carefully weighed and considered.

II. *The Labor Organizations Involved.*

Respondents, three locals of International Union of Operating Engineers, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.[4]

III. *Introduction.*

As will appear, this case is concerned with respondents' dealings with York, including an alleged threat by respondent to refuse to furnish employees to York. The General Counsel and York contend[5] that an object of this threat was to compel York to enter into a contract prohibited by Section 8(e) of the Act. Accordingly, the General Counsel argues, respondent violated Section 8(b)(3) and 8(b)(4)(ii)(A). Respondent, on the other hand, maintains that it did not trench upon either of the foregoing sections of the Act because the object of the threat it is alleged to have made did not fall within the proscription of Section 8(b)(4)(A).

4. Although they are separate labor organizations, respondents are closely related to each other. Accordingly, they will be referred to hereinafter collectively as respondent.

5. The contentions of the General Counsel and York being similar, they will be referred to hereinafter as the General Counsel's contentions.

IV. *The History of this Proceeding and Its Present Posture.*

As noted, on May 22 and 23, 1972, a trial was held before me on the issues raised by the pleadings in this matter. On the second day of the trial, after all parties had rested but before the record was closed, both charging parties; i.e., York and CAEP, entered into a private settlement agreement.[6]

Pursuant to their agreement with respondent, York and CAEP then moved to withdraw their charges and I granted these motions. Having done so, I dismissed the complaint in accordance with Section 102.9 of the Board's Rules and Regulations.[7]

On June 1, 1972, the General Counsel appealed to the Board from my order dismissing the complaint. During the pendency of the General Counsel's appeal York, on October 10, 1972, filed several motions with the Board, including a motion to vacate my dismissal of the complaint and a motion to reinstate the complaint. On March 19, 1973, the Board referred York's motions to me for ruling.

On August 7, 1973, after a hearing at which evidence was adduced, I denied York's various motions. Requests

6. The settlement agreement provided, among other things, that "York . . . will solve the dual company problem by May 1, 1975, to [respondent's] satisfaction." As will be seen, this problem is the root of the dispute between respondent and York. The nature of a dual company, the problems such a company raises for respondent, and the manner is which respondent sought to eliminate these problems, both in general and insofar as York was concerned, will be discussed in later sections of this Decision.

7. Insofar as material Section 102.9 provides that "upon withdrawal of any charge, any complaint based thereon shall be dismissed."

for review of this ruling were filed with the Board by the General Counsel and York.

On March 8, 1974, the Board decided the General Counsel's appeal from my order dismissing the complaint. As set forth in its order, the Board "concluded that the agreement of the parties underlying [my] acceptance of the Charging Parties' withdrawal of the charges and [my] consequent dismissal of the complaint has not settled the dispute."

Accordingly, the Board remanded this proceeding to me "for the purpose of preparing a written decision containing, findings of fact, conclusions of law, and a recommended order resolving the issues raised by the complaint in Cases 4-CB-1900 and 4-CC-653 [in which York . . . is the Charging Party]." In connection with the scope of the remand, the Board further concluded that "as the parties in Case 4-CB-1901 [in which CAEP is the charging party,] are willing to abide by their [settlement] agreement [, entered into on May 23, 1972,] . . . disturbing such agreement would not effectuate the policies of the Act."

In view of the Board's latter conclusion, the evidence adduced at the trial need be considered only insofar as it relates to the dealings between respondent and York; and findings of fact, conclusions, and recommendations are necessary only in that regard. Notwithstanding this posture of the proceeding, factual findings will be made, by way of background, concerning the bargaining engaged in by respondent and Engineers Employers, the subject of the charge in Case 4-CB-1901.

V. *Preliminary Findings and Conclusions.*[8]

A. The Dual Company Problem.

As was made apparent during the trial, a dual company in the segment of the construction industry in which respondent and York do business[9] consists of an enterprise having two parts, only one of which employs workers represented by respondent. It is the position of respondent that dual companies diminish its members' employment opportunities. Homer Dawson, respondent's president, testified that this comes about because such companies "[use] our people when it is to their advantage and [lay] them off when it is not to their advantage [to employ them]," thus creating "an intolerable situation for [respondent]." Moreover, Dawson continued, respondent feels that it has a responsibility not only "to preserve [its members'] work opportunities [but also to protect] employers who . . . do all their work 100% union . . . from unfair competition" posed by dual companies which, because of their nonunion adjunct, are able to underbid nondual companies.

In the hope of eliminating the problems resulting from the existence of dual companies and thereby enhance and preserve employment opportunities for persons whom it represents, respondent, during its bargaining with Engineers Employers, proposed and obtained the contract pro-

8. The purpose of these findings is to furnish a frame of reference within which to consider the facts relating to respondent's alleged unfair labor practices and the conclusions to which they may give rise. To the extent that the contentions of the parties relate specifically to the findings made here they will be treated here, although they, as will as the findings, may again be considered in other contexts.

9. As I have found, York is engaged in pile driving and in the construction of bridges and dams. Employees represented by respondent operate equipment and machines used in such work.

visions alleged in the complaint as being prohibited by Section 8(e) of the Act.[10]

York is one part of a dual company, the other part is G. A. and F. C. Wagman, Incorporated (Wagman). Wagman's employees have never been represented by respondent, but, at all material times, they have been represented by a labor organization not associated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) as is respondent. Dawson, respondent's president, described the Union representing Wagman's employees as being, with respect to respondent, "rival union."[11] Accordingly, notwithstanding such representation, in respondent's eyes Wagman is a nonunion employer.

York was formed by Wagman in 1960 as its wholly owned subsidiary. Before York's incorporation, Wagman was barred from working as a subcontractor on a construction project because the general contractor had an agreement with a union affiliated with the AFL-CIO precluding

10. The contract provisions complained of are as follows:

ARTICLE II

GENERAL PROVISIONS

• • •

Section 11—Non-Union Equipment

(a) No operator shall be required to operate equipment belonging to a contractor or supplier with whom this Local Union is not in signed relations, provided, Union equipment is available in the locality. No party to this agreement shall rent or supply equipment unmanned to anyone doing construction work covered by this agreement who is not in signed relations with this Union.

(b) No employee represented by this Union on construction work shall be required to operate equipment of or for any Employer who has any interest in a firm or company doing construction work within the jurisdiction of this Union and which is not in signed relations with this Union.

11. A "rival union," Dawson explained, is one "which does work in the same jurisdiction which [respondent] cover[s]."

it from subletting work to a subcontractor whose employees were not represented by a union similarly affiliated. To avoid the recurrence of such a situation Wagman created York so that Wagman "would have a company that was able to work as a sub-contractor to contractors who were AF of L and were bounds [sic] by their contracts just to sub-contract to people who were also a party to [such an] agreement." [12]

York and Wagman do the same type of construction work. Being Wagman's wholly owned subsidiary, all major decisions affecting York are made by Wagman. One of Wagman's vice presidents is also York's vice president. Both corporations are housed in the same building, employ office and professional workers in common, and the same equipment is used interchangeably by both.[13]

I make no judgment as to whether York and Wagman constitute a single employer. However, in view of the foregoing, and considering the purpose for which York was created by Wagman, York and Wagman may be considered to be separate parts of the same enterprise.

Although York did not immediately upon its corporation enter into an agreement with respondent, it apparently satisfied the purpose for which it was formed by obtaining its employees from respondent's hiring hall. In 1967 York joined CAEP which bargained with respondent on behalf of its members, including York, until 1971.

B. The Carved Out Employers.

The last collective-bargaining agreement between respondent and CAEP covering the latter's members, including York, expired on April 30, 1971.[14] On February 17 respondent informed CAEP, in writing, that it wanted to meet with CAEP for the purpose of negotiating an agreement to replace the one about to terminate. At the same time respondent notified CAEP that it wanted "to withdraw from negotiating with [CAEP] with respect to . . . York" and several other dual companies.[15]

12. The findings concerning York's formation are based upon, and the quotation appearing in the text is taken from, testimony given by John Rutter, a vice president of both Wagman and York.

13. Rutter testified, without stating the amount of the rent, that when one used the others' machinery rent was paid.

In response to its request for bargaining respondent was advised by CAEP that it would be represented in the negotiations by Engineers Employers, a broader based employer association. In doing so, however, CAEP made no mention of respondent's request to carve York and other dual companies out of the bargaining unit. Accordingly, respondent made a similar request of Engineers Employers which was acceded to on April 12.

C. The Bargaining Between Respondent and Engineers Employers.

Bargaining between respondent and Engineers Employers began early in April 1971. At the outset respondent presented for consideration by Engineers Employers a document containing the items it wanted to incorporate in the contract then under negotiation. Among these was the provision alleged in the complaint to have been prohibited by Section 8(e) of the Act.[16]

Not having obtained agreement to this provision, as well as several others, by April 30, the expiration date of the old contract, respondent, on the next day, struck the employers for whom Engineers Employers was the bargaining agent. The expired contract having also covered

14. All dates hereinafter mentioned without stating a year fall within 1971.

15. G. C. Exh. 4.

16. See footnote 10, above, for the terms of this provision.

York and the other carved out employers, they, too, were struck on May 1.

Bargaining between Engineers Employers and respondent continued through the strike. On July 7 agreement was reached on all outstanding matters, including the provision claimed to have been prohibited by Section 8(e) of the Act. Concerning this, as Harold Williams, one of the negotiators for Engineers Employers, testified, respondent's position was that unless it was agreed to "the strike would continue." Faced with this alternative, Engineers Employers accepted the provision and the strike ended, except with respect to York and the other carved out employers between whom and respondent there was still no collective-bargaining agreement.

The contract entered into by Engineers Employers and respondent upon the completion of their negotiations was to be effective, according to its terms, from May 1, 1971, to April 30, 1973, absent an extension.

VI. *The Alleged Unfair Labor Practices.*

A. Facts Concerning Respondent's Alleged Violation of Section 8(b)(3) and 8(b)(4)(ii)(A) of the Act.

During the bargaining between respondent and Engineers Employers respondent was informed that Engineers Employers would represent the carved out employers, including York, in any subsequent negotiations between the carved out employers and respondent. After respondent and Engineers Employers agreed upon a contract (standard contract) covering the employers who had not been removed from the unit respondent and Engineers Employers, as the representative of the carved out employers, met twice.

The first meeting, at which all the carved out employers were represented, took place on July 14, 1971. At

the second meeting, held on September 28, only York was represented.

At neither meeting did respondent seek a contract with York or any other carved out employer. At each meeting the requests for contracts came from the employers. Thus, as Harold Williams, a member of Engineers Employers' negotiating committee testified, on July 14, "we suggested that we would like everyone to sign the [standard] contract." Respondent's "response," as Williams further testified, "was that [it] would not sign up the singled out contracting companies, including York . . ., unless they eliminated the double-breasted operation that they are working under now, or were working under, in a stipulated period of time." [17]

The September 28 meeting, as has already been noted, was devoted entirely to York. York's spokesman was Howard Minckler, who, like Williams, was a member of Engineers Employers' negotiating committee.[18]

Minckler informed respondent of York's "position of not being able[, without a contract with respondent,] to bid on any work," and that York "wanted to be able to bid on union construction work." Accordingly, York again offered to sign the standard agreement.

This offer, as was the similar offer made on July 14 on behalf of York and the other carved out employers, was rejected by respondent. Homer Dawson, respondent's president, stated, in this regard, that York "would not be given an agreement unless [it] brought all [its] com-

17. It was later made clear that Williams used the term "double-breasted operation" as a synonym for "dual company operation."

18. My findings as to the events of this meeting are based upon the testimony given by Minckler and Homer Dawson, respondent's president, who was also present at the meeting. The quotations appearing in the text are taken from Minckler's testimony.

panies [19] under the agreement [and that York] would not be furnished any employees unless [it] signed an agreement." [20]

After some further discussion respondent changed its position and offered to consider any proposition respecting a contract which York might make, provided it was accompanied by an undertaking from the York-Wagman enterprise to eliminate its dual company operation within a stated period of time. In the absence of an estimate from York as to how long it would take to accomplish this, respondent suggested that a year would be acceptable. To this Dawson added that "if York had a different proposal, [respondent] would be willing to listen." York answered that it would "think about [the foregoing] and come back with a counter-proposal."

York, however, did not "come back with a counter-proposal." Instead, on October 7 York once more offered to sign the standard agreement without any change in the York-Wagman dual company operation. This offer respondent again refused to accept.

B. Contentions and Concluding Findings Concerning Respondent's Alleged Violations of Section 8(b)(3) and 8(b)(4)(ii)(A) of the Act.

To establish a violation of Section 8(b)(4) of the Act it must be shown that an object of a union's conduct falls within the proscription of one of its subsections.[21]

19. This was a reference to Wagman, which, as will be remembered, was the other part of the York-Wagman dual company.

20. Concerning the operation of respondent's hiring hall, Dawson testified that it was not respondent's "policy [to] furnish engineers to anyone without a signed contract," nor does respondent "refer employees to companies with whom it is not in collective bargaining relations."

21. The subsection of Section 8(b)(4) involved in this proceeding is subsection (A).

N. L. R. B. v. Denver Building and Construction Trades Council et al., 341 U. S. 675, 687-689. In the absence of such an object there is no violation of Section 8(b)(4). *Seafarers International Union etc. v. N. L. R. B.*, 265 F. 2d 585, 590 (C. A. D. C.); *Estes Express Lines, Inc.*, 181 NLRB 790, 791-792.

The General Counsel argues that an object of respondent's statement that it would not furnish employees to York [22] was to force York to enter into an agreement (the standard agreement) containing provisions prohibited by Section 8(e) of the Act. In this manner, he further argues, respondent violated Section 8(b)(4)(ii)(A).

On brief the General Counsel states that "of first consideration is whether [the standard agreement] violate[s] Section 8(e) of the Act." I do not agree. A finding that the standard agreement was prohibited by Section 8(e) would be of no consequence insofar as respondent's alleged violation of Section 8(b)(4)(ii)(A) is concerned unless, as the cases cited above teach, there is also a finding that an object of respondent's threat was to compel York to enter into it.[23] Accordingly, I will address myself first to respondent's object.

A review of the evidence shows that the elimination of dual companies was of prime importance to respondent. Respondent hoped to accomplish this in some measure by incorporating into the collective-bargaining agreement it entered into with Engineers Employers the provision alleged in the complaint to have been prohibited by Section 8(e) of the Act.

22. This statement is characterized in the complaint as being a threat to "refuse to furnish workers to York." For convenience I will adopt this characterization.

23. I use the past tense because all the events with which we are here concerned occurred in 1971 and the standard agreement was to expire, absent an extension, on April 30, 1973.

Insofar as respondent's direct dealings with dual companies including York, were concerned the evidence also demonstrates respondent's purpose to compel them to eliminate their non-union operations. This is made apparent not only by respondent's not seeking, or initiating requests for, contracts with the dual companies,[24] but also by the reasons given by respondent for not acceding to the dual companies' requests for contracts.

Thus, at the July 14 meeting respondent made it clear that it "would not sign up the singled out . . . companies, including York . . . , unless they eliminated [their] double-breasted operation." Similarly, at the September 28 meeting when York offered to sign the standard agreement in order to enable it "to bid on union construction work," respondent made it equally clear that it would not enter into any agreement with York unless York was willing to bring Wagman, its nonunion adjunct, "under the agreement;" i.e., whatever agreement respondent and York might enter into upon York's satisfying respondent's condition.

The foregoing does not bespeak an object on respondent's part to compel York to enter into a prohibited agreement by "threaten[ing]," to use the language of the complaint, "to refuse to furnish workers to York." It indicates, rather, that it was the object of respondent's threat to compel the York-Wagman enterprise to eliminate their dual company operation, and I so find.

For respondent to have sought to compel York-Wagman, an enterprise employing workers represented by respondent and workers not so represented to employ only

24. It will be remembered, in this regard, that at the meeting held on July 14, 1971, the requests for contracts between respondent and the dual companies were made by the dual companies, not by respondent; and at the September 28 meeting, at which only York was represented, York, and again not respondent, made the demand for a contract.

workers represented by respondent is not an object interdicted by Section 8(b)(4)(A) of the Act, which, in relevant part, proscribes only "forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e)." Nor did respondent violate Section 8(b)(3), with which it was also charged, by refusing to enter into a collective-bargaining contract with York unless York-Wagman agreed to employ only workers represented by respondent. *Corrugated Asbestos Contractos, Inc.*, 192 NLRB 32, 33-34, affd. 458 F. 2d 683 (C. A. 5).

Accordingly, I conclude that respondent violated neither Section 8(b)(3) nor 8(b)(4)(ii)(A) of the Act. I shall, therefore, recommend the dismissal of the complaint in Cases 4-CB-1900 and 4-CC-653, in which York is the charging party.

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law.

1. York is an employer in the construction industry within the meaning of Section 8(e) of the Act and is engaged in commerce within the meaning of Section 2(6) and 8(b)(4) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not engage in unfair labor practices within the meaning of Section 8(b)(3) or Section 8(b)(4)(ii)(A) of the Act.

Upon the foregoing findings of fact and conclusions of law and upon the entire record in this case, and pursu-

ant to Section 10(c) of the Act, I hereby issue the following recommended: [25]

ORDER.

It is ordered that the complaint in Cases 4-CB-1900 and 4-CC-653 be, and the same hereby is, dismissed.

Dated at Washington, D. C.

/s/ ALVIN LIEBERMAN
Alvin Lieberman
Administrative Law Judge

25. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX C.

[Dated 1/31/75] [D–9254, York, Pa.]

• • •

Decision and Order.

On June 18, 1974, Administrative Law Judge Alvin Lieberman issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges, in pertinent part, that Respondents are in violation of Sections 8(b)(4)(ii)(A) and 8(b)(3) of the Act by demanding, and threatening a refusal to furnish workers in furtherance of the demand, that the Charging Party, York County Bridge, Inc., (hereinafter York), enter into a collective-bargaining agreement with Respondents containing provisions prohibited by Section 8(e) of the Act.[1] As litigated, the allegation of

1. The complaint is a consolidated complaint and includes allegations based on a charge filed by Contractors Association of Eastern Pennsylvania in Case 4–CB–1901. That charge was withdrawn pursuant to a settlement agreement, and on March 8, 1974, the Board denied the General Counsel's appeal from the Admin-

the 8(b)(3) violation encompassed Respondents' related demand, as discussed more fully below, that York bring its parent company, G. A. and F. C. Wagman, Incorporated (hereinafter Wagman), under whatever agreement might be entered into between Respondents and York, including the recognition of Respondents as collective-bargaining representatives of certain of Wagman's employees.

The Administrative Law Judge concluded that no violation of Section 8(b)(4)(ii)(A) had occurred because, irrespective of whether the contractual provisions in controversy are prohibited by Section 8(e), Respondents did not attempt to force York to enter into any agreement containing these provisions. We find, on the contrary, that it was clearly Respondents' object to force York to agree to these provisions. Between 1967 and 1971, York was a member of the Contractors Association of Eastern Pennsylvania (CAEP), which bargained on behalf of its employer-members with Respondents. When the existing collective-bargaining agreement was about to expire in 1971, Respondents informed CAEP that it wanted to exclude York and several other companies from negotiations over the new multiemployer contract. Simultaneously, it informed York that it wished to meet with York independently to discuss a new contract. The employers consented to this arrangement.

Multiemployer bargaining began in April 1971. Not having secured an agreement containing the contested provisions by the expiration date of the existing agreement, Respondents struck the employers still in the multi-

1. (Cont'd.)

istrative Law Judge's action in granting the parties' motion to withdraw the charge in Case 4–CB–1901. The Board remanded this proceeding to the Administrative Law Judge for his decision on the issues raised by the complaint based on the charged filed by York in Cases 4–CB–1900 and 4–CC–653.

employer bargaining group. It also struck York and the other employers it had carved out of the group, on May 1. Bargaining with York had not even begun, presumably because Respondents were involved with the multiemployer bargaining and it was understood that York and the other "carved out" employers would be represented in the separate bargaining by Engineers Employers, the larger employers' association that was now representing the employer-members of CAEP who were still in the multiemployer bargaining group.

On July 7, 1971, the multiemployer group agreed to the contested provisions and the strike ended. Thereafter, bargaining between Respondents and the "carved out" employers began. The employers, including York, offered to adopt the agreement produced by the strike. Respondents refused this offer as to York unless York would agree to take steps toward bringing Wagman, its parent company, under the agreement. Thus, as the Administrative Law Judge found, during these negotiations it was the employers, not Respondents, who were urging adoption of the provisions in controversy. But as it was manifestly clear that Respondents would accept nothing less than these provisions, over which they had struck, it is unrealistic to infer that Respondents had abandoned their efforts to secure agreement to these provisions. To do so is to ignore the circumstances under which these parties came to the bargaining table and the pressures that were operating on them. The employers had been struck, along with the multiemployer group, for over 2 months and were now willing to accept the contract agreed to by the group in order to get back to work without further delay. Respondents continued to insist on the substance of the provisions they struck over and would not resume referring workers from their hiring hall until a contract was signed. That they were unwilling to enter into a con-

tract unless York agreed to accept certain additional terms, as discussed hereafter, does not, of course, take away from the fact that they continued to seek an agreement containing the provisions alleged to be prohibited by Section 8(e). We must, therefore, examine those provisions.

The provisions complained of are as follows:

> Section 11—Non-Union Equipment:
>
> (a) No operator shall be required to operate equipment belonging to a contractor or supplier with whom this Local Union is not in signed relations, provided, Union equipment is available in the locality. No party to this agreement shall rent or supply equipment unmanned to anyone doing construction work covered by this agreement who is not in signed relations with this Union.
>
> (b) No employee represented by this Union on construction work shall be required to operate equipment of or for any Employer who has any interest in a firm or company doing construction work within the jurisdiction of this Union and which is not in signed relations with this Union.

The gist of section 11, as its title suggests, is to give Respondents control over the employers or persons whose equipment may be used on construction work covered by the agreement, irrespective of whether the operator of the equipment is employed by a signatory or a stranger to the agreement. It constitutes an agreement to cease doing business with certain other persons, in situations not involving loss of work to employees represented by Respondents, and to that extent is prohibited by Section 8(e) unless saved by that section's construction industry proviso:

> That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . .

As we observed, upon a review of the legislative history, in *International Union of Operating Engineers, Local Union No. 12 (Acco Construction Equipment, Inc.)*,[2] the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite. In fact, the collective-bargaining agreement in which the contested provisions appear, in the instant case, contains a separate provision addressed to the problem of union and nonunion employees.[3]

The provisions of section 11, set forth above, have a different and broader effect. Neither the first sentence of section 11(a) nor section 11(b) is limited to situations where the boycotted supplier of the equipment has any employees at the jobsite. Were these provisions so limited they would be redundant in light of the provision quoted in the previous footnote herein. As these provisions reach beyond the performance of work at the jobsite they also reach beyond the construction industry proviso and are unlawful under Section 8(e).[4]

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2. 204 NLRB No. 115 (1973), at ALJD, "Discussion and Conclusions—Section 8(e)," p. 26.

3. "(b) Neither the Union nor any of its members shall be obligated to work on same job or project with, or service any contractor or sub-contractor not a party to an agreement with the Union. This shall not apply when the construction contracts are awarded directly by the Owner to the contractor or sub-contractor mentioned above."

4. *International Brotherhood of Electrical Workers, Local 1186, AFL-CIO (Pacific Electrical Contractors' Association)* 192 NLRB 254 (1971).

The General Counsel contends that these provisions, when read with other provisions of the agreement, also violate Sec. 8(e) because they contemplate "self-help" in their enforcement. Respondents argue, *inter alia*, that this contention has been rendered moot by subsequent events. We need not pass on these issues.

Section 11(b) of the agreement, as seen, excuses employees represented by Respondent from operating equipment of any employer who has any interest in a firm doing construction work within Respondents jurisdiction without a contract with Respondents. In addition to its prohibition by Section 8(e), this provision enters into the issue of whether Respondents have violated Section 8(b)(3) of the Act. The contract provision is aimed, at least in part, at what Respondents call the "dual company" problem. A "dual company" is a construction firm having two operating parts, only one having an agreement with union 1. The other part might or might not have an agreement with another union, but in any case does work within the territorial jurisdiction of union 1 on jobs where there is no subcontracting clause requiring an agreement with union 1. Where there is such a subcontracting clause, or otherwise as the firm sees fit, the operating division having an agreement with union 1 will bid on the job.

Such is the case with York. Wagman, which has an agreement with another union, formed York as a subsidiary which could bid on and perform jobs requiring agreement with Respondents and their affiliates. Since Wagman also does construction within Respondents' territorial jurisdiction, without being "in signed relations" with Respondents, York literally could not operate equipment with employees represented by Respondents if section 11(b) had been effectuated. York was willing to sign section 11(b) anyway, hoping that despite that provision it could "continue on as before," as York's representative was quoted by Respondents' president. Respondents, which had carved York out of the multiemployer group precisely because it was a "dual company," would not accept this, although it would continue relations with York temporarily in exchange for a gradual phasing out of Wagman's "nonunion" operation.[5]

Respondents thus did not, as they contend, disclaim as interest in continuing to represent the employees of York. Rather, they pursued an attempt to enlarge the bargaining unit by replacing with themselves the existing bargaining representative of the employees of Wagman.[6] This was not a mandatory subject of bargaining. Failing to disclaim representation of the employees, Respondents had a duty to bargain and therefore to refrain from holding the negotiations hostage to a demand for a nonmandatory subject. Respondents violated that duty. They went further and held the negotiations hostage to provisions banned by Section 8(e) of the Act, over which it had struck before York accepted them. They thus violated Section 8(b)(3) of the Act. By ceasing their established practice of furnishing workers to York, or threatening to do so, in support of their demand for provisions violative of Section 8(e), they coerced York within the meaning of Section 8(b)(4)(ii)(A).[7] Accordingly, we find that additional violation.

Conclusions of Law.

1. York County Bridge, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondents are labor organizations within the meaning of Section 2(5) of the Act and at all times material herein have been the exclusive representative of

5. In Respondents' view, an operation under agreement with a different union was "nonunion."

6. Cf. *International Brotherhood of Electrical Workers, AFL-CIO (Texlite, Inc.)*, 119 NLRB 1792 (1958).

7. *Columbus Building and Construction Trades Council, AFL-CIO (The Kroger Co.)* 149 NLRB 1224 (1964).

certain employees of York County Bridge, Inc., for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

3. By refusing to bargain collectively with York County Bridge, Inc., Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

4. By threatening, coercing, or restraining York County Bridge, Inc., with an object of forcing or requiring it to enter into an agreement which is prohibited by Section 8(e) of the Act, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(4)(ii)(A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondents, International Union of Operating Engineers, Locals 542, 542–A, 542–B their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Insisting, as a condition of executing a collective-bargaining agreement with York County Bridge, Inc., covering employees of that employer, or as a condition of continuing to furnish York County Bridge, Inc., with workers, that York County Bridge, Inc., enter into an agreement prohibited by Section 8(e) of the Act, or that such agreement cover employees in a unit currently represented by another labor organization.

(b) Refusing to refer, or threatening to refuse to refer, to York County Bridge, Inc., at its request individuals for employment in order to force or require York County Bridge, Inc., to enter into an agreement prohibited by Section 8(e) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with York County Bridge, Inc., subject to the provisions of Section 9(a) of the Act, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at Respondents' business offices and meeting halls, copies of the attached notice marked "Appendix." [8] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Sign and mail to the Regional Director for Region 4, sufficient copies of said notice, on forms provided by him, for posting at the premises of Charging Party York County Bridge, Inc., if the latter is willing.

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8. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated, Washington, D. C., January 31, 1975.

Howard Jenkins, Jr., Member
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which all parties had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice and to keep the promises that we make in this notice:

WE WILL NOT insist, as a condition of executing a collective-bargaining agreement with York County Bridge, Inc., or as a condition of continuing to furnish York County Bridge, Inc., with workers, that York County Bridge, Inc., enter into an agreement prohibited by Section 8(e) of the Act, or that such agreement cover employees in a unit currently represented by another labor organization.

WE WILL NOT refuse to refer, or threaten to refuse to refer, to York County Bridge, Inc., at its request individuals for employment in order to force or require York County Bridge, Inc., to enter into an agreement prohibited by Section 8(e) of the Act.

WE WILL bargain, upon request, with York County Bridge, Inc., over rates of pay, wages, hours of employment, and other terms or conditions of em-

ployment and, if an understanding is reached, embody such understanding in a signed agreement.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542-A
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542-B
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Suite 4400, William J. Green, Jr., Federal Building, 600 Arch Street, Philadelphia, Pennsylvania 19106, Telephone 215-597-7601.

APPENDIX D.

ACTING CHAIRMAN FANNING *dissenting:*

Contrary to my colleagues, I would find, in agreement with the Administrative Law Judge, that the Respondent Union's object in refusing to refer employees for employment by York was to compel that Company and Wagman, dual companies, to bargain for all their employees in a single unit. In my opinion, the evidence does not support the majority's conclusion that an additional and unlawful object of the Union was to require York to sign a contract containing the provisions alleged by the General Counsel to be prohibited by Section 8(e) of the Act. While the Union did, indeed, insist that the disputed provisions must be included in the standard contract negotiated with the multiemployer group in July 1971, York was specifically excluded from all negotiations and efforts to secure that contract. With respect to York, the record is clear that the Union refused to bargain with that Company for *any* contract unless and until York gave assurances that it would end its dual-company arrangement with Wagman and bargain with the Union as a single employer. The record is also clear that the alleged 8(e) provisions were designed to preclude the employers under contract with the Union from doing business with York and Wagman so long as Wagman was nonunion. If, however, York acceded to the Union's adamant position that York and Wagman must both be all-union companies before any contract could be negotiated, obviously the Union's need for the alleged 8(e) clauses would immediately evaporate. Whether or not the Union would nevertheless insist that these clauses must be included in a contract executed with York-Wagman is, in my opinion,

entirely speculative. I do not believe it is a reasonable ground to conclude, as the majority does, that the Union necessarily was at all times insisting that York execute a contract containing unlawful 8(e) clauses.

I would affirm the Administrative Law Judge's conclusion that the General Counsel has not produced sufficient evidence in this case to warrant a finding that the Union has violated Sections 8(b)(3) and 8(b)(4)(ii)(A) of the Act.

Dated, Washington, D. C., January 31, 1975.

John H. Fanning, Acting Chairman
NATIONAL LABOR RELATIONS BOARD

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

No. 75-1307

—

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS. LOCALS 542, 542A, 542B,
Respondents

York County Bridge, Inc.,
Intervenor

—

ON APPLICATION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Case Nos. 4-CB-1900
4-CC-653
4-CB-1901

—

Argued January 8, 1976

Before: VAN DUSEN, ADAMS and WEIS, *Circuit Judges.*

—

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General Counsel
John S. Irving,
Deputy General Counsel
Patrick Hardin,
Associate Gen. Counsel
Elliott Moore,
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Opinion of the Court

(Filed March 19, 1976)

WEIS, *Circuit Judge.*

Because the means selected were not tailored to the statutory pattern, the National Labor Relations Board cut off the efforts of a trade union to eliminate what it termed the "double-breasted operation" of a contractor. The

Board directed the local union to bargain with a subcontractor without insisting on certain contractual clauses designed to limit the sources from which the employer could obtain construction equipment. An alternate approach, the Local's endeavor to enlarge its representation at the expense of a rival union through improper bargaining with the employer, was also prohibited. We will enforce the Board's order.

York County Bridge, Inc. is a subcontracting firm engaged principally in pile driving and bridge construction and is a wholly-owned subsidiary of G. A. and F. C. Wagman, Inc. Wagman is also in the construction business. For many years its employees have been represented by District 50, Allied Technical and Construction Workers which later merged with the United Steelworkers.

Wagman was unable to secure subcontracts where the general contractor was required under its collective bargaining agreement to sublet only to employers whose workmen were represented by an AFL-CIO building trade union. To meet this situation, in 1960 Wagman incorporated the York Company which adopted the policy of securing labor through building trade union hiring halls.

In 1967, York joined the Contractors Association of Eastern Pennsylvania (CAEP), a multi-employer group, and thereby became a party to a collective bargaining agreement with Local 542 of the International Union of Operating Engineers.[1] When that contract expired in 1971, Local 542 advised CAEP that York and several other contractors would be "carved out" of bargaining for a new agreement because they were "dual companies."[2]

1. Respondents in this action are Locals 542, 542-A and 542-B. Since, to this point, the parties have referred to them in the singular as "Local 542," the "Local" or the "Union" and the disposition of the case affects all of them identically, we shall do the same.

2. The terms "dual company" and "double-breasted operation," for purposes of this case, refer to a construction enterprise which

The union considered the "dual companies," such as York-Wagman, a threat to job opportunities for Local 542 members and submitted contractual provisions to CAEP which were designed to resolve the problem. The union proposals were designated as Section 11 of a new contract:

"Section 11—Non-Union Equipment:

(a) No operator shall be required to operate equipment belonging to a contractor or supplier with whom this Local Union is not in signed relations, provided, Union equipment is available in the locality. No party to this agreement shall rent or supply equipment unmanned to anyone doing construction work covered by this agreement who is not in signed relations with this Union.

(b) No employee represented by this Union on construction work shall be required to operate equipment of or for any Employer who has any interest in a firm or company doing construction work within the jurisdiction of this Union and which is not in signed relations with this Union."

When no agreement had been reached by May 1, 1971, the union went on strike and its members did not return to work until July 13, 1971. On the next day, representatives of the "carved out" employers, including York, who were still struck, met with the union negotiators. The Local advised that not only would the "carved out" employers have to sign the standard contract but, in addition, they would be required to discuss some additional problems. York was told that it would have to end its dual

2. (Cont'd.)

consists of two companies (*e.g.*, a parent and its subsidiary), only one of which has a collective bargaining agreement with Local 542 or another AFL-CIO affiliate. The purposes and effects of these arrangements are more completely developed in the text.

operation within a period of time to be negotiated, and until agreement was reached, Local 542 would not furnish workers.[3]

During September and October of 1971, York stated that it would sign the standard contract but refused to bring Wagman "under the map of the agreement." Upon the union's refusal to accept this condition, a complaint was filed before the N. L. R. B. in which York alleged that it was being coerced to enter into a contract prohibited by Section 8(e) of the National Labor Relations Act, 29 U. S. C. § 158(e).

The administrative law judge found that the union's object was to compel York-Wagman to employ only Local 542 members, a result which he did not believe was in violation of the Act, and dismissed the complaint. The Board reversed, finding that the union's object was to force York's agreement to Section 11 of the standard contract, a provision which was prohibited by Section 8(e). Moreover, the Board held that the union had failed to bargain as required by the Act. One member of the three-man panel dissented.

The Board ordered the union to bargain with York and to desist from requiring the employer to enter into a prohibited agreement or insisting that the agreement cover the Wagman employees currently represented by another labor organization. We are asked to enforce the order.

The union asserts, *inter alia*, that the case is moot because the standard contract which incorporated Section 11 expired on April 30, 1973 and the succeeding agreements did not contain that language. The union had indicated its willingness to re-negotiate the controversial section so

3. In 1972, York and Local 542 seemingly settled their differences, and for a while York did employ members of the union. However, the parties soon disagreed on the terms of the settlement, and the strike resumed.

that it would be in compliance with Section 8(e). With the "allegedly objectionable" language no longer present, the union submits that the necessity for enforcing the order no longer exists and the case is moot.

It is firmly established that an N. L. R. B. order does not become moot by the mere compliance of the offending party. There remains a continuing obligation upon the party, and the Board is entitled to prevent the resumption of an unfair practice by the use of an enforcement decree. An order, lawful when made, does not become moot solely because changing circumstances may lessen its need. *C-B Buick v. N. L. R. B.*, 506 F. 2d 1086, 1092 (3d Cir. 1974). The possibilities of repetition of the offending conduct in the context of a continuing relationship between the parties is a relevant consideration. *N. L. R. B. v. Raytheon Co.*, 398 U. S. 25 (1970); *N. L. R. B. v. Mexia Textile Mills, Inc.*, 339 U. S. 563 (1950); *C-B Buick v. N. L. R. B., supra.*

The exclusion of Section 11 from the master contract now in effect does not make the issue moot. Despite the union's concession, no agreement on the precise wording has been reached with York and, absent a judicial determination that the clauses under review are proscribed, the negotiators would remain uncertain.

Moreover, the Board's decision was not limited to the legality of the contested contract language but necessarily included the refusal to bargain. An order directed toward that phase of an existing dispute cannot be considered moot.

Section 8(b)(4)(ii)(A) [4] of the National Labor Relations Act provides that it is an unfair labor practice for a

4. 29 U. S. C. § 158 reads in pertinent part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

union to threaten or coerce an employer where an object is to force him into an agreement prohibited by subsection (e). Proscribed agreements generally are those which prohibit the employer from using or handling the products of another employer or require the employer to cease doing business with any other person—so-called "hot cargo" clauses.[5] The prohibition, however, does not extend to an agreement between a labor organization and an employer in the construction industry relating to contracting of work "to be done at the site of the construction . . . ."

In the Board's view, Section 11 ran afoul of the statutory prohibition because it constituted an agreement by York to cease doing business with a non-signatory company in situations not involving loss of work by Local 542 members. Thus, if York had been awarded a contract and wished to employ Local 542 members, they would not have

4. (Cont'd.)

(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by subsection (e) of this section;

• • •

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, suing, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . ."

5. For a review of the clause and its ramifications, *see* Note: *Hot Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(e)*, 38 N. Y. U. L. Rev. 97 (1963).

been permitted *to use equipment rented from a company which did not have a bargaining agreement with Local 542.* The Board concluded that the construction industry exception in Section 8(e) did not apply because the boycotted supplier of *unmanned* equipment did not have employees on the jobsite and the offending section of the agreement "reach[es] beyond the performance of work at the jobsite."

The union's position is that Section 8(e) was intended to apply only to products which would be in corporated into the structure itself rather than to tools which were used in the building operation. Further, the union argues that the exempting proviso applies here because the equipment was to be used on the jobsite.

The issue is whether Section 11 is aimed at the labor relations of York vis-a-vis its own employees or whether it is "tactically calculated to satisfy union objectives elsewhere," *National Woodwork Manufacturing Association v. N. L. R. B.*, 386 U. S. 612, 644 (1967), that is, whether the activity of the union was primary or secondary. *See A. Duie Pyle, Inc. v. N. L. R. B.*, 383 F. 2d 772 (3d Cir. 1967); *Retail Clerks International Association, Local 1288 v. N. L. R. B.*, 390 F. 2d 858 (D. C. Cir. 1968).

In general, secondary activities for organizational purposes are prohibited. In recognition of the special problems of the construction industry, however, Congress enacted the proviso to Section 8(e). It is not a broad exemption as the Court explained in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U. S. 616, 630 (1974), but is limited to a single situation, allowing restrictive subcontracting agreements "only in relation to work done on a jobsite."

In *Eessex County & Vicinity District Council of Carpenters v. N. L. R. B.*, 332 F. 2d 636, 640 (3d Cir. 1964), we said the special treatment was

> ". . . apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside non-union men on the same project. The exemption does not extend to other agreements such as those relating to subcontracts for supplies and materials to be transported to and delivered on the construction site."

The latter statement was later qualified in *National Woodwork Manufacturers Assn. v. N. L. R. B., supra,* where the Supreme Court approved a ban on the use of pre-cut doors in a building because the restriction protected the jobs of union members on that particular project. The Court characterized the boycott there as a shield for job protection and not as a sword for organizational activity. 386 U. S. at 630.

The policy behind Section 8(e) and the construction industry proviso does not support the union's position. Its insistence on York's boycott of a non-signatory's equipment does not serve to protect the jobs of its members who may be called upon to work on any specific project which has been awarded to York.[6] Whether York owned or leased the equipment would have no effect on the number of men employed on a particular project.

The union's restrictive view of the subject matter of the hot cargo clause (*i.e.*, not to extend to equipment) and its expansive view of the exemption proviso are incon-

6. *See* Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1025 (1965), in which the author states, "The second limitation the Board has imposed insists that protective efforts involve bargaining unit employees only, as distinguished from 'members of the union in general.'" *See also* Milk Drivers Union v. N. L. R. B., 335 F. 2d 326 (7th Cir. 1964).

sistent with the developing body of case law. In *Acco Construction Equipment, Inc. v. N. L. R. B.*, 511 F. 2d 848 (9th Cir. 1975), on-site repair of heavy construction equipment was held to be outside the exemption and, consequently, attempts to organize the mechanics were prohibited secondary activities. In two cases, courts decided that the delivery of ready-mixed concrete to the jobsite, even when additional work on the product is required at the scene, was not covered by the construction industry exemption. *Drivers, Salesmen, Local Union No. 695 v. N. L. R. B.*, 361 F. 2d 547 (D. C. Cir. 1966); *N. L. R. B. v. International Brotherhood of Teamsters, Local 294*, 342 F. 2d 18 (2d Cir. 1965).

At best, the union's argument makes out only a doubtful interpretation of the Act, but in such situations the Board's interpretation and application are entitled to weight. *N. L. R. B. v. Denver Building & Construction Trades Council*, 341 U. S. 675, 692 (1951). We fail to see how the rationale of eliminating friction between union and non-union workers on a jobsite could have any application to the use of inanimate equipment. *Essex County & Vicinity District Council of Carpenters v. N. L. R. B., supra.*

The Board's conclusion that Section 11 violated Section 8(e) was not erroneous.

Local 542 also contests the finding of coercion. It insists that, when York did not sever its ties with Wagman, the union no longer had any desire to enter into a collective bargaining arrangement. However, based on substantial evidence in the record, the Board found to the contrary. It felt that the Local's course of conduct, both before and after the strike, including the meetings with York, established an intention to enter into a contract with the company, albeit on unacceptable terms. It is significant also that the union has never issued any formal and

unequivocal disclaimer of a desire to represent York employees. Consequently, the Board had substantial support in the record for its finding that the union was attempting to coerce York into signing an illegal agreement in violation of § 8(b)(4).

The Board found that Local 542 was attempting to enlarge the bargaining unit by replacing the union which represented the Wagman employees. Having determined that the Operating Engineers Local had not disavowed representation of York employees, the Board ordered the union to bargain in good faith as required by Section 8(b)(3) [7] of the Act. Local 542's desire to become the representative of Wagman employees was not a required subject of bargaining and, therefore, the Local was told to "refrain from holding the negotiations hostage to a demand for a non-mandatory subject."

While parties are free to include voluntary subjects in their collective bargaining, those matters may not be made prerequisites to agreements on mandatory items. *N. L. R. B. v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958); *Industrial Union of Marine and Shipbuilding Workers v. N. L. R. B.*, 320 F. 2d 615, 618 (3d Cir. 1963). The record here supports the Board's position that Local 542 wished to take over representation of Wagman employees from the United Steelworkers. The Operating Engineers were attempting, not to preserve

7. 29 U. S. C. § 158(b)(3) reads in part:

"[T]o refuse to bargain collectively with an employer, provided it is the representative of his employees . . .

• • •

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."

their existing representation arrangement but, rather, to expand the bargaining unit. Since an objective of this nature is not a mandatory bargaining matter, the union's insistence upon it constituted a failure to bargain in good faith. *N. L. R. B. v. Local 19, International Brotherhood of Longshoremen,* 286 F. 2d 661 (7th Cir.), *cert. denied,* 368 U. S. 820 (1961); *N. L. R. B. v. International Brotherhood of Electrical Workers* [Texlite Co.], 119 N. L. R. B. 1792 (1958), *enforced,* 266 F. 2d 349 (5th Cir. 1959). *See also Smith Steel Workers v. A. O. Smith Corp.,* 420 F. 2d 1 (7th Cir. 1969). The Board's conclusion is both correct and fully consistent with the spirit of the Act. As the Supreme Court said in *Connell Construction Co. v. Plumbers & Steamfitters:*

> "One of the major aims of the 1959 Act was to limit 'top down' organizing campaigns, in which unions used eonomic weapons to force recognition from an employer regardless of the wishes of his employees. Congress accomplished this goal by enacting § 8(b)(7), which restricts primary recognitional picketing, and by further tightening § 8(b)(4)(B), which prohibits the use of most secondary tactics in organizational campaigns. Construction unions are fully covered by these sections. The only consideration given them in organizational campaigns is § 8(f), which allows 'prehire' agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation. The legislative history accompanying § 8(f) also suggests that Congress may not have intended that strikes or picketing could be used to extract prehire agreements from unwilling employers." (footnotes omitted) 421 U. S. at 632.

The union responds that since York and Wagman were so closely interrelated, they were a single employer, and thus there was no violation of the duty to bargain. However, the Board did not find that York and Wagman constituted a single employer and, even if such a determination had been made, it could not have made bargaining on expansion of the unit a mandatory item. In the context of this case, the fact that only one employer might be involved does not alter the scope of the mandatory bargaining. *See N. L. R. B. v. I. B. E. W.* [Texlite], *supra.* The union's reliance, therefore, upon *Local 627, International Union of Operating Engineers v. N. L. R. B.,* 518 F. 2d 1040 (D. C. Cir. 1975), is misplaced because that case turned on whether there was actually only a single employer.

Accordingly, we find that the Board did not err in deciding that Local 542 failed in its duty to bargain with York.

The order will be enforced in all respects.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1307

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCALS 542, 542-A, 542-B,
Respondents

York County Bridge, Inc.,
Intervenor

Before: VAN DUSEN, ADAMS and WEIS, *Circuit Judges.*

ORDER AMENDING OPINION

It is ORDERED that the second full paragraph on page 11 of the slip opinion be amended so as to read:

"Accordingly, we conclude that there was no error in the Board's decision that Local 542 failed in its duty to bargain with York."

JOSEPH F. WEIS, JR.
Circuit Judge

Dated: April 7, 1976

APPENDIX F.

ADAMS, *Circuit Judge,* dissenting.

The Court today enforces an order directed at violations of sections 8(b)(3) and 8(b)(4)(ii)(A) of the National Labor Relations Act.[1] Because the Board failed to make certain findings which in my view are necessary to the resolution of the controversy before us, I cannot agree that enforcement of the Board's order is appropriate at this time. I am therefore constrained to dissent.

Fundamental to the dispute in this matter is the identity of the "employer" with which Local 542 is to deal in its collective bargaining negotiations on behalf of its members. The Local maintains that York County Bridge (York) and G. A. & F. C. Wagman, Inc. (Wagman) are an integrated corporation, constituting one employer. It argues that the separation of the single employer into two parts is in effect a subterfuge designed to permit the company to obtain construction contracts both within Philadelphia (where subcontractors that are not signatories to agreements with AFL-CIO affiliated unions are prohibited from working on construction projects) and outside Philadelphia (where no such limitation exists). Under this set of hypothesized facts, bargaining would properly take place between Local 542 and the unitary York-Wagman Company.[2] York, of course, takes the opposite tack. It submits that it and Wagman are distinct entities, and that any pressure brought by Local 542 against York in order

1. 29 U. S. C. §§ 158(b)(3), 158(b)(4)(ii)(A) (1970).

2. Complicating the legal significance of Local 542's demand for the right to represent those workers is the fact that District 50 of the Allied Technical and Construction Workers currently represents the construction engineers employed by the Wagman side of the enterprise. *See* not 7 *infra.*

to affect Wagman must therefore be secondary in nature. In the context of its understanding of the facts, York urges that Local 542 may not insist upon the right to bargain with Wagman and may not impose a "hot cargo" clause upon York.

Resting its decision on a narrow ground, the Board did not make a specific finding with regard to the identity of the employer. Over the dissenting voice of Acting Chairman Fanning, it held that the Local's demands transgressed the dictates of section 8(b) of the Act. The Board could reach that result only by concluding that resolution of the single/dual employer issue is not essential to a determination of the unfair labor practice charges. By enforcing the Board's order, the majority of the Court necessarily agrees with that stance.

My reading of the law is different, however. In my opinion, a ruling on the unfair labor practice charges cannot properly be made, in the circumstances of this case, without a prior finding on the single/dual employer question. Enforcement of the Board's order would thus appear inappropriate.

A. *The Section 8(b)(3) Charges*

Section 8(b)(3) of the Act makes a union's refusal to bargain collectively with an employer an unfair labor practice. The duty to bargain collectively, as defined in section 8(d), includes "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and [to] confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."[3] Although a union may bring economic pressure to bear upon an employer

3. 29 U. S. C. § 158(d) (1970).

during the negotiations,[4] it may not condition bargaining upon discussion of matters about which bargaining is not made mandatory by the terms of section 8(d).[5] That is, a union commits an unfair labor practice if it refuses to discuss subjects respecting "wages, hours, and other terms and conditions of employment" unless the employer agrees at the same time to discuss items that do not concern those matters.[6]

The charge in this case is that Local 542 refused to come to the bargaining table so long as two specified non-mandatory terms were excluded from discussion. The first non-mandatory item, a hot cargo clause, is discussed in part B of this opinion. Local 542 is also charged with demanding negotiations over a term expanding the bargaining unit to include employees on the Wagman side of the enterprise.[7] Insistence on an inappropriate bargaining

4. NLRB v. Insurance Agents' Int'l Union, 361 U. S. 477 (1960).

5. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U. S. 342, 349 (1958).

6. The Act is symmetrical in this regard, placing the same burden upon the employer through § 8(a)(5), 29 U. S. C. § 158 (a)(5) (1970).

7. Section 9 of the Act, 29 U. S. C. § 159 (1970), sets out the procedures that govern the selection of the appropriate bargaining unit. The choice of the unit can be critical to a union's success in organizing an employer's workers, since a union may represent only employees who are within a bargaining unit in which a majority of the unit voted for the union in a Board-sanctioned election. Sections 9(a), 9(c)(1) of the Act, 29 U. S. C. §§ 159(a), 159(c)(1) (1970). The identification of the bargaining unit has frequently been "the decisive factor in [B]oard elections, determining whether there would be any collective bargaining at all in a plant or enterprise. Unions and employers have sought to gerrymander accordingly." B. Meltzer, *Labor Law* 290 (1970).

Local 542 was selected in an election taken among the members of the York bargaining unit. Wagman has employees who perform the same tasks as the members of Local 542, and who

unit has been held violative of section 8(b)(3),[8] and the unit would be improper if York and Wagman are separate employers.[9]

But if York and Wagman are in effect a single employer, the expansion of the bargaining unit to include Wagman employees could well be a matter concerning the "terms and conditions of employment" of the members of Local 542. As such, it would be a mandatory subject of bargaining, and a demand by Local 542 that it be discussed would not be a section 8(b)(3) violation.[10]

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7. (Cont'd.)

would possibly be included in the same bargaining unit as Local 542's members if York and Wagman constitute one employer.

The Wagman employees are currently represented by District 50, however. If the bargaining unit is to encompass both York and Wagman employees, Local 542 could perhaps endeavor to obtain a ruling by the Board that York and Wagman are one employer, in the context of seeking a new representation election among all York-Wagman employees who perform similar work. The election bar of § 9(c)(3) or the contract bar announced in Deluxe Metal Furniture Co., 121 N. L. R. B. 995 (1958), could stand in the way of such an approach. *See* NLRB v. Burns Int'l Security Services, Inc., 406 U. S. 272, 279 n. 3 (1972); Brooks v. NLRB, 348 U. S. 96 (1954).

8. Sperry Systems Mgt. Div. v. NLRB, 492 F. 2d 63, 67-68 (2d Cir.), *cert. denied*, 419 U. S. 831 (1974); Smith Steelworkers v. A. O. Smith Corp., 420 F. 2d 1, 8 (7th Cir. 1969); Douds v. International Longshoremen's Ass'n, 241 F. 2d 278, 281-83 (2d Cir. 1957).

9. The collective bargaining obligation, whose structure is built upon the bargaining unit established in accord with § 9 of the Act, exists only between an employer and the representative of its employees. Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U. S. 157, 166-70 (1971).

10. Local 542 alleges that Wagman uses its subsidiary, York, to employ and lay off Local 542 members as bidding conditions require, giving it a useful device to avoid employing such personnel except where essential, and depriving the union of substantial work opportunities. This practice would certainly be viewed as having a telling impact upon the union's members. *Cf.* Chemical & Alkali

The outcome of the section 8(b)(3) charge brought against Local 542 thus appears to hinge upon a prior determination of the relationship between York and Wagman. If they are separate employers, the finding of an unfair labor practice on the part of Local 542 is most probably justified; if they are a single employer, the Local has probably not violated section 8(b)(3). Absent the antecedent finding, I would not enforce the Board's order relating to the section 8(b)(3) violation.

B. *The Section 8(b)(4)(ii)(A) Charges*

Similarly, I believe that a proper resolution of the section 8(b)(4)(ii)(A) charge depends upon the same finding regarding the relationship between York and Wagman.

Section 8(b)(4)(ii)(A) provides that a labor union commits an unfair labor practice when it threatens, coerces, or restrains an employer with the objective of forcing that employer to enter an agreement containing a hot cargo clause prohibited by section 8(e) of the Act. The majority's review of the record indicates that there is a basis for the Board to have found that Local 542 sought to include such a hot cargo clause in its collective bargaining contract with York. I agree that there is such a basis. But that in itself is not enough to establish a violation of section 8(b)(4)(ii)(A), for the element of restraint or coercion by the union must also be established.

Local 542 refused to furnish York with employees until an acceptable contract had been negotiated. Such re-

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10. (Cont'd.)

Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U. S. 157, 178-79 (1971).

Significantly, the subcontracting of work to non-union contractors, which has a similar effect upon the work opportunities of the union members, has been held to be a mandatory subject of bargaining. Fibreboard Corp. v. NLRB, 379 U. S. 203, 215 (1964).

fusal constitutes restraint or coercion within the meaning of section 8(b)(4)(ii)(A) only if the employer is dependent upon the union's referral of employees.[11] But whether York was dependent upon Local 542 members turns on whether York is an independent enterprise, unable to bid successfully in its geographical area of operation without a contract with the Local, or is merely a segment of the unitary York-Wagman entity, relying on the Local for only part of its operation. A finding by the Board on the single/dual employer question would thus appear to be a prerequisite to a ruling on whether Local 542 violated the terms of section 8(b)(4)(ii)(A) of the Act, just as it is critical to the 8(b)(3) charges.

C. *Disposition of the Petition*

The analyses set forth in parts A and B of this opinion suggest the propriety of a denial of enforcement of the Board's order and a remand to the Board for a determination whether York and Wagman are one employer or two. In the unusual circumstances of this case, however, I believe that a remand is unnecessary, and that denial of enforcement alone is the course that the Court should take.

Under the compulsion of the rule of *C-B Buick*,[12] the majority holds that the case is not, as a technical matter, moot. With that conclusion I cannot differ. But the status of the current relations between Local 542 and York, as I perceive them, leads me to believe that the case no longer represents a viable dispute, and that a remand and possible enforcement of a Board order *in futuro* are unnecessary. Counsel for Local 542 indicated in open court that his client no longer has an interest in negotiating a collective bargaining contract with York, and that a hot cargo clause will not be sought in any event. Such a posture substantially reduces the Board's interest in ensuring that the parties will observe those rules of fair play established by Congress in section 8 of the Act.[13] When it is apparent that no further bargaining will be undertaken, the Board's interest would appear to be attenuated, making judicial enforcement of its order unnecessary.

This Court has long held that the judicial response to a Board order may be fashioned, in an exercise of the Court's equitable power, so as to further the objectives of the Act.[14] Given the stance of the relations between the union and the employer, a continuation of proceedings in this matter would not further the objectives of the Act, and the Court's equitable power should therefore not be invoked. This is particularly so in light of the limited development in the record concerning the single/dual employer issue, a newly evolving area of labor law. For that reason, it seems that it would be most fitting to close the case here, and to deny enforcement without a remand for further proceedings.

11. Plumbing & Pipefitting Local 5 v. NLRB, 321 F. 2d 366, 370-71 (D. C. Cir.), *cert. denied*, 375 U. S. 921 (1963); Columbus Bldg. & Trades Council, 149 N. L. R. B. 1224, 1225-27 (1964). *Cf.* NLRB v. Operating Engineers Local 825, 315 F. 2d 695, 699 (3d Cir. 1963).

12. C-B Buick, Inc. v. NLRB, 506 F. 2d 1086, 1092 (3d Cir. 1974).

13. *Cf.* H. K. Porter Co. v. NLRB, 397 U. S. 99, 102-04 (1970).

14. C-B Buick, Inc. v. NLRB, 506 F. 2d 1086, 1092 (3d Cir. 1974); NLRB v. Kingston Cake Co., 206 F. 2d 604, 611 (3d Cir. 1953); NLRB v. Globe Auto Sprinkler Co., 199 F. 2d 64, 70 (3d Cir. 1952); NLRB v. National Biscuit Co., 185 F. 2d 123, 124 (3d Cir. 1950) (per curiam). *Cf.* NLRB v. Cheney California Lumber Co., 327 U. S. 385, 389-91 (1946) (Stone, C. J., concurring).

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1307

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCALS 542, 542-A, 542-B,
Respondents,

YOUR COUNTY BRIDGE, INC.,
Intervenor.

Judgment.

Before: VAN DUSEN, ADAMS and WEIS, *Circuit Judges.*

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondents, International Union of Operating Engineers, Locals 542, 542-A, 542-B, their officers, agents, and representatives, on January 31, 1975. The Court heard argument of respective counsel on January 8, 1976, and has considered the briefs and transcript of record filed in this cause. On March 19, 1976, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondents, International Union of Operating Engineers, Locals 542, 542-A, 542-B, their officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against Respondents.

BY THE COURT

Joseph F. Weis, Jr.
Circuit Judge

DATED: April 19, 1976

Certified as a true copy and issued in lieu of a formal mandate on May 13, 1976.
Test:
M. ELIZABETH FERGUSON
Chief Deputy Clerk, U. S. Court of Appeals for the Third Circuit.

Costs taxed in favor of petitioner as follows:

Brief	$199.10
Appendix	466.65
TOTAL	$665.75

Costs taxed in favor of intervenor as follows:

Brief	$279.97